Supreme Court, U.S.
FILED

03 1 1 10 NOV 3 - 2003

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRAD R. JOHNSON,

Plaintiff

v.

MICHAEL P. McCUSKEY,

DAVID G. BERNTHAL,

Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Questions Presented for Review are categorized by court and nature of issue and are presented as follows.

In the United States Court of Appeals for the Seventh Circuit

Absolute Judicial Immunity

1. Under part one of the *Stump* test, whether the Seventh Circuit Court of Appeals erred in holding that each of the Defendants' acts, which allegedly violate a federal criminal statute, is in the nature of a **judicial act?**
    a. Whether each of alleged criminal violations.
        (1) of **18 U.S.C. Section 1001** by Defendant Bernthal (i.e., intentionally falsifying a judicial report and recommendation to serve his own personal agenda) and
        (2) of **18 U.S.C. Sections 371 & 1001** by Defendant McCuskey (i.e., covering up a criminal violation again to serve his own personal agenda)

        is NOT in the nature of a function typically performed by judges and therefore CANNOT be a judicial function?]
    b. Whether the United States Court of Appeals for the Seventh Circuit erred in misrepresenting Plaintiff's allegation of fact (i.e., Defendant Bernthal intentionally falsified a judicial report and recommendation to serve his own personal agenda) by finding that Defendant Bernthal merely *treated* Defendants' Motion as if it were something other than what it was truly NOT?

Injunctive Relief

2. WHETHER the Seventh Circuit Court of Appeals erred in holding that Pulliam v. *Allen*, 466 U.S. 522, 541-42 (1984) (judicial immunity does not extend to injunctive relief) as applied to a *Bivens* action has been abrogated by Congressional amendment to § 1983 ("injunctive relief shall not be granted" in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity . . ."?

STATEMENT OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

CORPORATE DISCLOSURE STATEMENT

There is no parent or subsidiary company to be listed, as there exists no party who is a corporation.

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OPINIONS BELOW

United States District Court for the Southern District of Illinois

1. The Memorandum and Order, filed December 23, 2002, of District Judge David R. Herndon in the United States District Court for the Southern District of Illinois Granting Defendants' Motion to Dismiss with Prejudice is printed in Appendix A, page A-2.

2. Judgment in a Civil Case, filed December 23, 2002 (in favor of Defendants and against Plaintiff) in the United States District Court for the Southern District of Illinois is printed in Appendix A, page A-4.

United States Court of Appeals for the Seventh Circuit

3. The Order of the United States Court of Appeals for the Seventh Circuit, decided August 5, 2003, affirming the District Court's dismissal of the instant case (though partially on different grounds), whose affirming judgment is here sought to be reviewed, is unpublished and is printed in Appendix A, page A-5.

4. The Judgment – Without Oral Argument - of the United States Court of Appeals for the Seventh Circuit, dated August 5, 2003, affirming the Judgment of the District Court is here sought to be reviewed, is printed in Appendix A, page A-10.

STATEMENT OF JURISDICTION

The Unpublished Order of the United States Court of Appeals for the Seventh Circuit (Appendix A, page A-5) affirming the Judgment of the District Court (though partially on different grounds) was decided on August 5, 2003. The Judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A, page A-10) affirming the Judgment of the District Court was dated August 5, 2003.

The jurisdiction of the Court is invoked under U.S. Const. Art. III and 28 U.S.C. Section 1254 on review of a judgment of a United States Court of Appeals, as said judgment is final under 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

Facts

In 2001, Plaintiff filed a pro se complaint in the United States District Court for the Central District of Illinois against (1) the Franchise Tax Board of the State of California; (2) the Office of the Attorney General, Department of Justice, State of California; (3) Bill Lockyer, Attorney General, State of California; (4) Dennis L. Stout, District Attorney, County of San Bernardino, California; (5) Office of the District Attorney, County of San Bernardino, California; and (6) County of San Bernardino, California. See *Johnson v. Franchise Tax Board*, No. 01-CV-2145 (C.D. Ill.).

This case (*Johnson v. Franchise Tax Board*) can be described as a civil rights claim for money damages (actual and punitive) and injunctive and declaratory relief under the United States Constitution, particularly pursuant to the provisions of the Fourteenth Amendment to the Constitution of the United States, and under federal law, particularly pursuant to Title 42 of the United States Code, Section 1983 and Title 28 of the United States Code,

Sections 2201 and 2202 for the purpose of enjoining said Defendants from enforcing Sections 19271 and 18670 of the California Revenue and Taxation Code on the basis that the conduct, policies and practices of said Defendants have violated Plaintiff's U.S. Constitutional Guarantee of Procedural Fairness flowing from the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution , where Plaintiff's prayer for relief seeks a "preliminary and permanent injunction enjoining defendants (Stout and Lockyer) and employees/agents/officers of defendants (Franchise Tax Board, Attorney General's Office, San Bernardino, and District Attorney's Office), their agents, employees, and those acting in concert with them, from (i) enforcing Sections 19271 and 18670 of the California Revenue and Taxation Code and (ii) collecting on any amount of child support arising from a 1986 Multnomah County, State of Oregon child support order in which Plaintiff-Petitioner is the obligor and Viki S. Hollander is the obligee in a manner that violates federal and state law regarding child support enforcement. Jurisdiction in the United States District Court for the Central District of Illinois is based on federal question pursuant to 28 U.S.C. Section 1343.

In that case, Plaintiff alleged that California State public officials have intentionally and wantonly and with malice of forethought collected nonexistent, "delinquent" child support amounts, in the complete absence of power to do so, for the purpose of obtaining increased federal incentive grant dollars for their child support enforcement efforts. In a nutshell, Plaintiff contended that employees of San Bernardino County, Child Support Enforcement intentionally used the long and powerful arm of the State of California to intentionally victimize Plaintiff by taking the property of Plaintiff, a resident of the State of Illinois, without due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, where the motivation for such acts was the resultant federal incentive grant subsidies received by the

County of San Bernardino for its state child support enforcement efforts. The facts of this case demonstrate how legitimate national policy concerns for child support enforcement, resulting in federal incentive grant subsidies for state (i.e., county) child support enforcement efforts, have led to state child support enforcement actions, in the absence of any power to accomplish those actions, where such actions violate due process under the Fourteenth Amendment to the Constitution of the United States.

Specifically, about December 1999, employees of San Bernardino County (Office of the District Attorney), State of California [including Defendant Stout] in a San Bernardino County Court "IV-D Case" registered a foreign 1986 Multnomah County, State of Oregon Child Support Order, for which Viki S. Hollander was the obligee and Plaintiff was the obligor, in the absence of all power to do so. This act was known by such employees of San Bernardino County (Office of the District Attorney), State of California [including Defendant Stout] to have been accomplished in the absence of any power to do so, i.e., without the notice, authorization, approval, permission, or acquiescence of either the obligor (Plaintiff) [Affidavit of Brad R. Johnson] or obligee (Viki S. Hollander) [Affidavit of Viki S. Hollander], thereby resulting in a default judgment against Plaintiff.

Plaintiff contended that since December 1999, Plaintiff has been a target and victim of Defendants' unconstitutional, criminal and tortious schemes and artifices to take Plaintiff's property.

In July 2001, Defendants moved the District Court, in the alternative *Motion for Change of Venue*, to transfer the proceedings to the United States District Court for the Central District of California pursuant to 28 U.S.C. Section 1406(a) because it is the district in which all of the defendants reside or do business pursuant to 28 U.S.C. Section 1391(a).

Plaintiff (in the case at bar) alleges that in reviewing the Defendants' Motion to Transfer, United

States Magistrate Judge, David G. Bernthal recognized that Defendants took the wrong approach to transfer the case to California. Instead, Plaintiff **(in the case at bar)** alleges that Bernthal recognized that Defendants should have moved the District Court to transfer the proceedings to the United States District Court for the Central District of California pursuant to 28 U.S.C. Section 1404(a), where jurisdiction is based on federal question pursuant to 28 U.S.C. Section 1391(b), **since venue was clearly proper in the Central District of Illinois.** Accordingly, Plaintiff (in the case at bar) alleges that Defendant Bernthal stepped in the shoes of the Defendants and on August 28, 2001, to fulfill his own personal agenda, filed his *Report and Recommendation* (hereinafter referred to as the *Report*), which **falsely stated** that **Defendants moved the District Court "to transfer the proceedings to the United States District Court for the Central District of California pursuant to 28 U.S.C. Section 1404 because all Defendants reside in California and a substantial part of the events occurred there."** *Report*, p. 3.The *Report* concludes (1) by granting the *Motion for Change of Venue* under 28 U.S.C. Section 1404 **[not U.S.C. Section 1406(a)]**, where the *Report* found venue controlled by 28 U.S.C. Section 1391(b) **[not by 28 U.S.C. Section 1391(a)]**. The *Report* also provides a waiver of objection provision. *Report*, p. 5. Thus, if Plaintiff did not catch Defendant Bernthal's alleged fraud upon the court, Plaintiff waived his right forever more to do so.

Plaintiff **(in the case at bar)** alleges that by stepping into the shoes of Defendants and intentionally and maliciously falsifying the *Report* to serve his own personal agenda, Defendant Bernthal:

1. Criminally violated **18 U.S.C. Section 1001**, wherein Defendant Bernthal knowingly and willfully –
   a. falsified, concealed, and covered up by trick, scheme, and device a material fact [i.e. **the basis upon which Defendants were making their Motion to Transfer**];

b. made a materially false, fictitious, and fraudulent statement or representation [i.e., **that the basis upon which Defendants were making their Motion to Transfer was the tandem application of Sections 1404(a) and 1391(b)**]; and

c. made and used a false writing or document [i.e., the **Report**] knowing the same to contain a materially false, fictitious, and fraudulent statement or entry.

2. Subjected Plaintiff (or caused Plaintiff to be subjected) to the deprivation of his U.S Constitutional Guarantee of Procedural Fairness flowing from the Due Process Clause of the Fifth Amendment of the U.S. Constitution ["[N]or shall any person . . . be deprived of life, liberty or property, without due process of law;" U.S. Const. amend. V.] More specifically, Defendant Bernthal deprived Plaintiff of his liberty interest in the right to a fair and impartial adjudicative process, *rather than an arbitrary adjudicative process*, without due process of law, as secured by the Fifth Amendment to the Constitution of the United States.

As permitted by Fed.R.Civ.P. 72(b), on September 17, 2001, Plaintiff filed *Plaintiff's Objection to the Report and Recommendation of the United States Magistrate Judge, David G. Bernthal and Motion to Reconsider.*

On September 19, 2001, Defendant McCuskey entered an *Order*, wherein "[a]fter a thorough and careful de novo review," Defendant McCuskey:

1. GRANTED Defendants' *Motion for Change of Venue* and ordered the case transferred to the Central District of California pursuant to 28 U.S.C. Section 1406(a), where Defendant McCuskey identified 28 U S.C. Section 1391(b) as controlling venue and specifically found:

   a. "Plaintiff is correct that Defendants did not ask this court to transfer venue pursuant to 28 U.S.C. Section 1404(a)." *Order*, p. 2.

b. "Defendants incorrectly argued that Plaintiff based 'the venue of the present action in large part upon the court's diversity jurisdiction [28 U.S.C. Section 1391(b)].'" *Order*, p. 2.

c. DENIED *Plaintiff's Motion to File Amended Complaint*, where the District Court specifically found "that it is unlikely that Plaintiff left out of his Complaint any material events giving rise to the claim that would connect this claim to the Central District of Illinois." *Order*, p. 5.

Plaintiff **(in the case at bar)** alleges that in GRANTING Defendants' *Motion for Change of Venue*, but DENYING *Plaintiff's Motion to File Amended Complaint*, Defendant McCuskey:

1. Abdicated his administrative role in supervising inferior Magistrate Judge Bernthal in favor of serving his long-standing personal relation with Defendant Bernthal.
2. Criminally violated **18 U.S.C. Section 1001**, wherein Defendant McCuskey knowingly and willfully concealed, and covered up by trick, scheme, and device a material fact [i.e. **the criminal conduct of Defendant Bernthal in intentionally and willfully falsifying the basis upon which Defendants were making their Motion to Transfer**], which impliedly suggests a conspiracy to defraud the United States under **18 U.S.C. Section 371**.
3. Subjected Plaintiff (or caused Plaintiff to be subjected) to the deprivation of his U.S. Constitutional Guarantee of Procedural Fairness flowing from the Due Process Clause of the Fifth Amendment of the U.S. Constitution ["[N]or shall any person . . . be deprived of life, liberty or property, without due process of law." More specifically, Defendant McCuskey deprived Plaintiff of his liberty interest in the right to a fair and impartial adjudicative process, rather than an arbitrary adjudicative process, without due process of law, as

secured by the Fifth Amendment to the Constitution of the United States.

The Rulings Below

The U.S. District Court

In the case at bar, Defendants moved the U.S. District Court for the Southern District of Illinois to dismiss the case pursuant to **Rule 12(b)(6).** In his Memorandum and Order, District Judge Herndon GRANTED Defendants' *Motion to Dismiss* citing that authority principally relied upon by Defendants.

Defendants principally relied on the doctrine of absolute judicial immunity as stated in:

1. *Scruggs v. Moellering*, 870 F.2d 376, 377 (7th Cir.), cert.denied, 493 U.S. 956 (1989), abrogated on other grounds, Antoine v. Eyers & Anderson, Inc.,508 U.S. 429 (1993) and also
2. *Mireles v. Waco*. 502 U.S. 9, 11-12 (1991) (per curiam); *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996), cert. denied, 519 U.S. 1118 (1997).

In their *Motion to Dismiss*, Defendants argued: "A judge's act of deciding a motion in a case is certainly performed within his judicial capacity. The defendant judges are entitled to judicial immunity because all of the actions Johnson alleges in his complaint are judicial in nature." *Brief*, p. 4.

Although *Stump* was cited, neither the Defendants nor Judge Herndon formally applied the *Stump* test.

The U.S. Court of Appeals

In the case at bar, Plaintiff argued: While Defendant Bernthal was preparing the *Report* (in the Franchise Tax Board Case), Defendant Bernthal stepped in

the shoes of the Defendants and on August 28, 2001, to fulfill his own personal agenda, filed the *Report* (in the Franchise Tax Board Case), which **falsely stated** that **Defendants moved the District Court "to transfer the proceedings to the United States District Court for the Central District of California pursuant to 28 U.S.C. Section 1404 because all Defendants reside in California and a substantial part of the events occurred there."** *Report*, p. 3.

In Defendants' Reply Brief, page 3 (**in the case at bar**), Defendants trivialized Defendant Bernthal's conduct in writing the *Report* (in the Franchise Tax Board Case) by stating that Defendant Bernthal merely "**cited to an incorrect statute regarding change of venue**."

Defendant Bernthal did not merely cite to an incorrect statute; he stated that Defendants had made a *Motion to Transfer* pursuant to **28 U.S.C. Section 1404,** which presumes venue is proper. Plaintiff alleges (**in the case at bar**) that Defendant Bernthal stepped in the shoes of the Defendants (in the Franchise Tax Board Case) and intentionally and maliciously made this false statement to serve his own personal agenda

In dark contrast to either Plaintiff's contention:

- Defendant Bernthal stepped in the shoes of the Defendants and on August 28, 2001, to fulfill his own personal agenda, filed the Report, which **falsely stated** that **Defendants moved the District Court "to transfer the proceedings to the United States District Court for the Central District of California pursuant to 28 U.S.C. Section 1404 because all Defendants reside in California and a substantial part of the events occurred there."** *Report*, p. 3.

or Defendants' contention:

- Defendant Bernthal merely "**cited to an incorrect statute regarding change of venue.**"

the **United States Court of Appeals for the Seventh Circuit** (herein after referred to as the Seventh Circuit)

concocted its own set of facts, different from either Plaintiff's contention or Defendants' argument, wherein the Seventh Circuit stated (Order, A-6):

- "The defendants moved for a change of venue pursuant to 28 U.S.C. § 1406(a). **Magistrate Judge David Bernthal recommended granting the motion, but he analyzed it as if it had been filed pursuant to 28 U.S.C. § 1404(a) rather than § 1406(a).** "

In order to affirm the District Court, the Seventh Circuit felt obliged to misrepresent the facts, as either alleged by Plaintiff or argued by Defendants. Clearly, Defendant Bernthal did not "analyze the motion . . . as if it had been filed pursuant to 28 U.S.C. § 1404(a), rather than § 1406(a)," as the Seventh Circuit found. Instead, Defendant Bernthal stated that **Defendants moved the District Court "to transfer the proceedings to the United States District Court for the Central District of California pursuant to 28 U.S.C. Section 1404 . . ."** *Report*, p. 3.

After finding that Defendant Bernthal "analyze[d] the motion . . . as if it had been filed pursuant to 28 U.S.C. § 1404(a), rather than § 1406(a)," the Seventh Circuit held that Defendants were entitled to absolute judicial immunity. Here, the Seventh Circuit applied the *Stump* test to the facts that they had concocted and held (not surprisingly) that Defendant Bernthal's action in the Franchise Tax Board Case ("analyz[ing] the motion . . . as if it had been filed pursuant to 28 U.S.C. § 1404(a), rather than § 1406(a)") was a "decision to apply a particular statute concerning venue," where "[t]hat decision plainly was made in the judge's capacity as a judicial officer, and Johnson's characterization of it as "criminal" is patently frivolous." Order, A-7.

If Defendant Bernthal would have stated that he was treating Defendants' Motion (in the Franchise Tax Board Case) as a motion under 28 U.S.C. § 1404(a) [where venue is presumed to be proper], rather than § 1406(a) [for improper venue]"), Plaintiff admits that Plaintiff's case

would be one of a frivolous nature and Plaintiff declares that Plaintiff would not have filed his *Bivens* Complaint. However, Defendant Bernthal did not make this statement. Instead, Plaintiff alleges that Defendant Bernthal stated that Defendants did something that Defendant Bernthal knew they did not do. Plaintiff alleges that Defendant Bernthal never expected to be caught in his lie, given that Plaintiff was a pro se Plaintiff. Further, if not caught within 10 days, Defendant Bernthal's alleged lie would become truth due to the waiver provision contained in the *Report*.

REASONS FOR GRANTING THE WRIT

Dr. Brad R. Johnson, the Plaintiff-Appellant-Petitioner, prays that a Writ of Certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Seventh Circuit in this case dated August 5, 2003, affirming the holdings of the U.S. District Court for the Southern District of Illinois. This order should be reviewed by this honorable Court because of the compelling reasons that follow.

The Rendered Decision of the United States Court of Appeals for the Seventh Circuit (**in the case at bar**)

- (i) **Overlooks a Clear Distinction which Supreme Court Cases have Drawn and in doing so Creates a Conflict among the Circuits on an Issue and**
- (ii) **is in Conflict with the Decision of Another Court of Appeals on the Same Important Matter and**
- (iii) **has decided an important question of federal law in a way that conflicts with Relevant Decisions of the Supreme Court and**
- (iv) **has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of the Supreme Court's supervisory power and**

(v) **has decided an important question of federal law that has not been, but should be, settled by the Supreme Court.**

Issue #1

Under part one of the *Stump* test, whether the Seventh Circuit Court of Appeals erred in holding that each of the Defendants' acts, which allegedly violate a federal criminal statute, is in the nature of a **judicial act?**

Issue #1: Part a. Whether each of alleged criminal violations:

- of **18 U.S.C. Section 1001** by Defendant Bernthal (i.e., intentionally falsifying a judicial report and recommendation to serve his own personal agenda) and
- of **18 U.S.C. Sections 371 & 1001** by Defendant McCuskey (i.e., covering up a criminal violation again to serve his own personal agenda)

is NOT in the nature of a function typically performed by judges and therefore CANNOT be a judicial function?

Issue #1a-1: Whether the justifications that support the doctrine of absolute judicial immunity apply in the case of a judge's violation of a federal criminal statute?

> "**No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.**" *United States v. Lee*, 106 U.S. 196, 220 (1882).

The Doctrine of Absolute Judicial Immunity in American Jurisprudence

In general, so long as a **judge** is performing a judicial act that is not clearly beyond the jurisdiction of the court, judicial immunity applies to those acts. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). The United States Supreme Court has consistently upheld the common-law doctrine that judicial immunity protects a **judge** of a court of general jurisdiction unless he or she performs a non-judicial act or acts in the "clear absence" of jurisdiction, even if the **judge** acts erroneously, corruptly, or in excess of jurisdiction. [See, e.g., ***Stump v. Sparkman,*** 435 U.S. 349, 356-57 (1978).] The Supreme Court explained that "[f]ew doctrines were more solidly established at common law than the immunity of **judges** from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in *Bradley v. Fisher*." *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967) (citing *Bradley*, 80 U.S. (13 Wall.) at 351-52). As a result, the Supreme Court held that the public interest in the exercise of judicial authority without apprehension of personal consequences applies to all judicial acts, except those done in the clear absence of jurisdiction. *Stump*, 435 U.S. at 356-57.

Clear Legislative Intent to Abrogate Doctrine of Absolute Judicial Immunity

The United States Supreme Court has stated that this doctrine "should not be abrogated absent clear legislative intent to do so." *Pulliam v. Allen*, 466 U.S. 522, 529 (1984) (citing *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)).

Legal Effect of Absolute Judicial Immunity

Like other forms of immunity, judicial immunity is an immunity from the suit itself, not just from the ultimate assessment of damages. *Mitchell v Forsyth*, 472 U.S. 511, 526 (1985)

Justifications for the Doctrine of Absolute Judicial Immunity

The justifications in support of judicial immunity include the following: "(1) it ensures the finality of judgments; (2) it protects judicial independence; (3) it avoids continual attacks upon **judges** who may be sincere in their conduct; and (4) it protects the system of justice from falling into disrepute." Jeffrey M. Shaman et al., Judicial Conduct & Ethics, 14.01, at 491 (2d ed. 1995). The most important reason for the cloak of absolute judicial immunity is the independence of the judiciary. Id. at 492.

Issue #1a-2: When the acts of judges involve both **judicial and nonjudicial conduct,** whether the unprotected behavior must be separated from the shielded behavior, where the judge may be held liable for any **nonjudicial acts?**

The Law
Stump v. Sparkman

Facts: In *Stump v. Sparkman*, 435 U.S. 349 (1978), the mother of a fifteen-year-old mentally-handicapped girl successfully petitioned a state court **judge** to approve the sterilization of her daughter. The surgery was performed, but the daughter was unaware of the nature of that surgery. Years later, when the girl discovered her sterility and its cause, she sued, among others, the **judge** for constitutional violations. Id. at 351-54.

The Courts Below: The district court found that the **judge** had acted within his jurisdiction and was immune from suit. Id. at 354. The Court of Appeals for the Seventh Circuit reversed, holding that the **judge** acted outside of his jurisdiction. Id. at 355.

Upon review: the United States Supreme Court announced a *two-part test* for assessing judicial liability in civil suits for damages against ***state judges***:

1. Whether the actions complained of were "judicial" acts. Id. at 360.
   a. The Court also defined two factors [Id. at 362] that determine what constitutes a "judicial" act:
      (1) whether the act was in the nature of a function typically performed by **judges** (i.e., whether the precise act was a normal judicial function), and
      (2) whether the parties' interaction with the **judge** in his or her judicial capacity conformed with the parties' expectations.
2. Whether said acts fell clearly outside the **judge's** subject matter jurisdiction. Id. at 356.

Whether the Actions Complained of Were "Judicial" Acts

Under the first part of the test to determine judicial liability, if the act complained of is not found to be a judicial act, then absolute judicial immunity is inapplicable and further inquiry is unnecessary. [See *Harris v. Deveaux*, 780 F.2d 911, 914 (11th Cir. 1986).] In this circumstance, a **judge** may be found liable for monetary damages. If, however, the precise act is found to be a judicial act, the second part of the test dictates that he will be subject to liability only if he acted in the "'clear absence of all jurisdiction.'" Id. (quoting ***Stump v. Sparkman***, 435 U.S. 349, 357 (1978)). The Court reasoned that these two inquiries must be made to determine a **judge's** accountability for his actions. [See id. at 356-63.]

Nonjudicial Acts

The law is clear that "[i]t is only for acts performed in his 'judicial' capacity that a **judge** is absolutely immune." [Id. at 360.] The court in *King v. Love* stated that "[a]n act is non-judicial if it is one not normally performed by a judicial officer **or** if the parties did not deal with the **judge** in his official capacity." *King v. Love*, 766 F.2d 962, 965 (6th Cir. 1985). (Bold added.)

Other factors to be considered in determining if an act is judicial are whether (1) the precise act complained of is a normal judicial function; (2) the events involved occurred in the **judge's** chambers; (3) the controversy centered around a case then pending before the **judge;** and (4) the confrontation arose directly and immediately out of a visit to the **judge** in his official capacity. *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). These factors show that the test is a practical test, which must be applied on a case-by-case basis. Thus, there is no formula for making this determination; **rather it requires a fact-based analysis, focusing on "the 'nature' and 'function' of the act."** *Mireles v. Waco*, 502 U.S. 9, 13 (1991) (per curiam)(quoting *Stump*, 435 U.S. at 362). (Bold added.)

Accordingly, factual issues arise when the acts of judges involve both judicial and nonjudicial conduct. If the acts complained of "involve both judicial and nonjudicial conduct, the unprotected behavior must be separated from the shielded" behavior, and the judge **may be held liable for any nonjudicial acts.** *Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982) (citing Crowe v. Lucas, 595 F.2d 985, 990 (5th Cir. 1979)). In *Brewer v. Blackwell*, the Fifth Circuit found that a justice of the peace performs a judicial act when he issues an arrest warrant. Id. at 396-97. However, he performs nonjudicial acts when he personally arrests and pursues a suspect in his automobile. Id. at 397.

A clear example of a nonjudicial act is found in *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981). In *Harper*,

the plaintiff went to his ex-wife's office in a Florida courthouse to deliver a child support check. *Harper*, 638 F.2d at 850. In his attempts to find her, Harper was eventually confronted by **Judge** Merckle outside the **judge's** chambers. Id. In this non-official setting, the two men exchanged words, and **Judge** Merckle had Harper arrested for contempt; conducted an on-the-spot "hearing" where the **judge** acted as complaining witness, prosecutor, fact finder, and **judge;** and ultimately ordered Harper incarcerated. Id. at 851-54. Based on these facts, the Fifth Circuit held, **only . . . when it is beyond reasonable dispute that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives,** and it further appears certain that no party has invoked the judicial machinery for any purpose at all, then the **judge's** actions do not amount to "judicial acts." Id. at 859. There, the court of appeals concluded that the actions complained of were not judicial acts." Id. at 859. [See also *Roush v. Hey*, 475 S.E.2d 299, 307 (W. Va. 1996) (holding a **judge** is not immune for comments made on a national television show, "Crossfire," concerning the merits of one of his decisions).]

The Court of Appeals for the Seventh Circuit found that a **judge** who, near midnight and on his own initiative, caused the plaintiff to be arrested, arraigned, convicted on a forged guilty plea, and incarcerated for 240 days, was not immune from liability. *Lopez v. Vanderwater*, 620 F.2d 1229, 1231-32, 1237 (7th Cir. 1980). In addition, the court in *Harris v. Harvey* found that a racially motivated **judge,** who harassed the plaintiff with criminal investigations and calls to the media and city officials demanding he be fired from the police force, was not immune from a civil rights suit. Harris v. Harvey, 605 F.2d 330, 333-34, 337 (7th Cir. 1979).

Absolute Judicial Immunity for Damages under the Civil Rights Act of 1871

Most civil suits for damages against state **judges** are brought under the federal Civil Rights Act, 42 U.S.C. 1983. To state a claim upon which relief can be granted against a **judge** under the Civil Rights Act, the plaintiff must make the two-part showing required under section 1983 and also allege that the **judge's** actions were taken either in the "clear absence of all jurisdiction" or were nonjudicial in nature. Ammons v. Baldwin, 705 F.2d 1445, 1446-47 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984).

In *Ammons v. Baldwin*, a state **judge** was found to be immune from damages for certain acts including issuing an arrest warrant, assessing court costs against plaintiff for himself as well as others, and verbally abusing and humiliating the plaintiff. Id. at 1446-47. However, the **judge** was not immune for alleged threats to abuse plaintiff physically. Id. at 1448. But the plaintiff "failed to allege an injury which rose to the minimal level required to invoke federal jurisdiction." Id.

In Carter v. Rupracht, 532 F. Supp. 383 (D. Nev. 1981), the plaintiff filed a civil rights suit against a justice of the peace, alleging that the justice of the peace had violated his constitutional rights by conducting a hearing where witnesses were not sworn prior to testifying, admitting perjured testimony, not following the applicable law, and denying the right to appeal. Id. at 384. The plaintiff also alleged that while he was in jail, the justice of the peace threatened him with physical harm "'if he did not get in line,'" and also threatened to have his "dog killed unless 'he stopped causing all of the problems to the City.'" Id. On these facts, the district court held that the plaintiff had not stated a cause of action under section 1983. Id. at 386. The court found that under Stump the justice of the peace was entitled to **absolute immunity** for all conduct during the hearing, either in court or in chambers. Id. at 385. However, the court held that the justice of the peace

was not entitled to immunity for making verbal threats to the plaintiff while he was in the county jail, because such conduct is not judicial. Id. In regard to the civil rights claim, the court found that the plaintiff failed to allege that any federal right had been violated by the **judge's** verbal threats. Id. at 385-86.

In *Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982), four men working for a tree-pruning business were arrested because they dumped garbage, thinking it was a load of tree branches, in a landfill. Id. at 390. The men brought a three million dollar civil rights suit against, among others, the justice of the peace who allegedly arrested them, chased one of them in his own car, tried them, and required them to sign a "hold-harmless" agreement before releasing them from jail. Id. at 390, 392-93. At trial, the testimony on all major issues was contradictory. Id. at 392. The district court entered a directed verdict in favor of the justice of the peace on the basis of judicial immunity. Id. at 390. On appeal, the United States Court of Appeals for the Fifth Circuit found that two of the plaintiffs' claims against the justice were nonjudicial (and therefore not protected by immunity) and also gave rise to a cause of action under the Civil Rights Act. Id. at 396-98. The court concluded that the justice of the peace was not immune for either the alleged arrest or the pursuit because these were not judicial acts, and that a reasonable juror might have concluded that he committed both of these acts. Id. at 397. The court further noted that if, on remand, it was found that the defendant did in fact make an invalid arrest, this would constitute a deprivation of constitutional rights under section 1983. Id.

Criminal Indictment of Members of the Federal Judicial Branch

"A **judge** may be prosecuted... for official misdemeanors or crimes... before an ordinary court, or by impeachment before the Senate of the United States." 20

American State Papers 151 (Washington 1834) (H.R. Misc. Doc. No. 87) (report dated May 9, 1796, communicated to the House on May 10, 1796).

As defendants in modern times, indicted members of the federal judicial branch began to challenge the proposition that the criminal indictment of sitting **judges** is permissible under the Constitution, courts have unanimously endorsed such propowition. Over the past twenty-five years, Otto Kerner of the United States Court of Appeals Seventh Circuit [See *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974). The charges on which **Judge** Kerner was convicted principally involved his acceptance of bribes while Governor of Illinois, but also included making false statements to the grand jury and Internal Revenue Service investigators after becoming a **judge.** Id. at 1131.] Alcee L. Hastings of the United States District Court for the Southern District of Florida, and Eugene Henry Claiborne of the United States District Court for the District of Nevada were each indicted and then claimed immunity from prosecution. In all three instances, the Circuit Court rejected the claim [See *U.S. v. Claiborne*, 727 F.2d at 845-49; *U.S. v. Hastings*, 681 F.2d at 709-11; *Isaacs*, 493 F.2d at 1141-44] and the Supreme Court denied certiorari [See *Claiborne*, 727 F.2d at 842, cert. denied, 469 U.S. 829 (1992); *Hastings*, 681 F.2d at 706, cert. denied, 459 U.S. 1203 (1983); *U.S. v. Isaacs*, 493 F.2d at 1124, cert. denied, 417 U.S. 976 (1974)]. Indeed, more recently, **Judge** Walter Nixon of the United States District Court for the District of Mississippi did not even find it worthwhile to make the assertion of absolute judicial immunity, nor did **Judge** Robert F. Collins of the United States District Court for the Eastern District of Louisiana, nor did **Judge** Robert P. Aguilar of the United States District Court for the Northern District of California - a particularly telling instance since the Supreme Court reviewed the conviction at length on the merits, and none of the several opinions even considered the point worth an allusion.

The courts' unanimous rejection of claims of absolute judicial immunity from criminal prosecution is soundly based. Each of the foregoing cases have held that the impeachment and indictment remedies were designed to be separate; that the considerations are similar to those involved in the indictment of sitting federal legislators, a long-sanctioned practice; and that "whatever immunities...the Constitution confers for the purpose of assuring the independence of the co-equal branches of government...punishment for [criminal] conduct will not interfere with the legitimate operations of a branch of government." *United States v. Isaacs*, 493 F.2d 1124, 1144 (7th Cir. 1974).

Issue #1a: Summary

The justifications that support the doctrine of absolute judicial immunity do not apply in the case of a judge's violation of a federal criminal statute.

No judge is above the law and no judge should receive absolute judicial immunity for violations of federal criminal statutes. 20 American State Papers 151 (Washington 1834) (H.R. Misc. Doc. No. 87) (report dated May 9, 1796, communicated to the House on May 10, 1796). *United States v. Lee*, 106 U.S. 196, 220 (1882). Because Congress has seen fit to label a particular act a violation of federal criminal law (e.g., **18 U.S.C. Section 1001**), Congress has clearly spoken to the effect that the doctrine of absolute judicial immunity should be abrogated in any case where a judge acts in a manner that violates federal criminal law (e.g., **18 U.S.C. Section 1001**). *Pulliam v. Allen*, 466 U.S. 522, 529 (1984) (citing *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967)). The justifications that support the doctrine of absolute judicial immunity do not apply in the case of a judge's violation of a federal criminal statute (e.g., **18 U.S.C. Section 1001**). Jeffrey M. Shaman et al., Judicial Conduct & Ethics, 14.01, at 491 (2d ed. 1995).

*When the acts of judges involve both **judicial and nonjudicial conduct**, the unprotected behavior must be separated from the shielded behavior, where a judge may be held liable for any **nonjudicial acts**?*

Under part one of the *Stump* test, the Court defined two factors [*Stump v. Sparkman*, 435 U.S. 349, 362 (1978)] that determine what constitutes a "judicial" act: (1) whether the act was in the nature of a function typically performed by **judges** (i.e., whether the precise act was a normal judicial function), and (2) whether the parties' interaction with the **judge** in his or her judicial capacity conformed with the parties' expectations. See *Harris v. Deveaux*, 780 F.2d 911, 914 (11th Cir. 1986); *King v. Love*, 766 F.2d 962, 965 (6th Cir. 1985); *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972); ***Mireles v. Waco***, 502 U.S. 9, 13 (1991) (per curiam)(quoting *Stump*, 435 U.S. at 362).

Further, factual issues may arise when the acts of judges involve both judicial and nonjudicial conduct. If the acts complained of "involve both judicial and nonjudicial conduct, the unprotected behavior must be separated from the shielded" behavior, and the judge **may be held liable for any nonjudicial acts.** *Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982) (citing Crowe v. Lucas, 595 F.2d 985, 990 (5th Cir. 1979)).

Accordingly, in the case at bar, the acts that Plaintiff complains of are not judicial acts.

Clearly, under the facts in the instant case, an alleged criminal violation of **18 U.S.C. Section 1001** either by Defendant Bernthal intentionally falsifying a report to serve his own personal agenda or by a Defendant McCuskey covering up a criminal violation again to serve his own personal agenda is NOT in the nature of a function typically performed by **judges** (i.e., such acts are NOT and CANNOT be normal judicial functions). Further, such acts do not conform to the expectations of the parties,

since the parties expect such judges to be independent. See *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981); *Roush v. Hey*, 475 S.E.2d 299, 307 (W. Va. 1996); *Lopez v. Vanderwater*, 620 F.2d 1229, 1231-32, 1237 (7th Cir. 1980); Harris v. Harvey, 605 F.2d 330, 333-34, 337 (7th Cir. 1979); Ammons v. Baldwin, 705 F.2d 1445, 1446-47 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984); Carter v. Rupracht, 532 F. Supp. 383 (D. Nev. 1981); *Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982).

Issue 1a - Conclusion

In many cases, the doctrine of absolute judicial immunity has resulted in an invitation to judicial lawlessness, where judicial officers are virtually above the law.

Realistically and practically, when a **judge** chooses to act in a manner that violates Federal criminal law, he is no longer acting as a representative of the judicial branch; rather, the **judge** becomes an individual in society acting on his own free will. [See *Pierson v. Ray*, 386 U.S. 547, 567 n.6. (1967) (Douglas, J., dissenting) ("When a **judge** acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a **judge,** but as a minister' of his own prejudices."); *Bradley*, 80 U.S. (13 Wall.) at 357 (Davis, J., dissenting) (reasoning that a **judge** acting maliciously or corruptly is acting outside the judicial context and should be "subject to suit the same as a private person would be [acting] under like circumstances").] Indeed, the allowance of such actions under the guise of a **judge's** "judicial capacity" defeats the purpose of the justice system entirely. *Pierson*, 386 U.S. at 567 n.6 (holding that the presence of ill will coupled with "the intention to deprive a person of his civil rights is wholly incompatible with the judicial function."). [See also *Stump*, 435 U.S. at 367 (Stewart, J., dissenting) (maintaining that "[a] **judge** is not free, like a loose cannon, to inflict

indiscriminate damage whenever he announces that he is acting in his judicial capacity."); *Stump*, 435 U.S at 370 (Powell, J., dissenting) (stating that where a judicial officer acts within his jurisdiction, or "in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available," the doctrine set forth in *Bradley* proves "inoperative").]

Justice Field, in Bradley, seemed to condone the cost of sacrificing the individual rights granted by the Constitution. He reasoned that the justice system itself provides other means for protecting such rights. *Bradley*, 80 U.S. (13 Wall.) at 350 (maintaining that the exercise of judicial power done "maliciously, or corruptly, or arbitrarily, or oppressively . . . [may result in] impeachment and suspen[sion] or remov[al] from office."). Justice Powell's dissent in *Stump* reiterated Justice Field's position by stating that "private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights." *Stump*, 435 U.S. at 370 (Powell, J., dissenting) (emphasis added). However, as noted, Justice Powell conceded that a line must be drawn at some point to obviate a complete sacrifice of rights.

As a result, the Supreme Court's view of the importance of maintaining and securing judicial independence as dominant over the constitutional rights of mere citizens becomes a sad and unmistakable reality. [See *Pierson*, 386 U.S. at 566-67 (Douglas J., dissenting) (recognizing that the "evils of allowing intentional, knowing deprivations of civil rights to go unredressed far outweigh the speculative inhibiting effects which might attend an inquiry into a judicial deprivation of civil rights").] Indisputably, as Justice Douglas has so eloquently stated, "[t]he plight of the oppressed is indeed serious." *Pierson*, 386 U.S. at 567 (Douglas, J., dissenting). Further, in 1988 Justice O'Connor articulated the danger in the **absolute immunity** doctrine, maintaining that just

because a **judge's** acts are within his scope of authority does not necessitate a finding that it is a judicial act. *Forrester v. White*, 484 U.S. 219, 230 (1988) (citing Forrester v. White, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting)). Such a result would, in effect, "lift form above substance." Id.

Maintaining that the inquiry with regard to a judge's potential for liability ends if said **judge** is not without jurisdiction invites judicial misbehavior when a **judge** acts within his statutory discretion. Consequently, in such a situation, a **judge** may be less inclined to use caution in his decision-making despite the potential for constitutional violations. The reason being that excessive independence results from a lack of judicial accountability, which may, in effect, promote unconstitutional behavior by **judges**. **Plaintiff contends** that holding judicial officers liable for constitutional violations in circumstances similar to the instant case will curtail excessive judgments. The requisite additional scrutiny would examine judicial motive and evaluate the personal objectives of the judicial actor. If criminal ill will or malfeasance in the decision-making is evident, the judicial officer has acted wrongly and outside of his jurisdiction and should be liable for the consequences of those actions. This final inquiry may ultimately serve to bring the test full circle because a **judge** who has acted with criminal ill will or malfeasance must be viewed as having acted in a nonjudicial manner. Therefore, the first part of the *Stump* test would not be fulfilled, and judicial immunity protection would not be granted.

The above analysis has opened up one of the crevices of the well-established absolute judicial immunity doctrine and exposed the hidden dangers that result from an abstract application of the current two-part *Stump* test. If **Judges** are not corrupt when they became **judges,** the system offers an irresistible occasion to become corrupt because it gives them the power to violate the rights of the people who our Supreme Court has ruled, shall have no

effective recourse against them. In the case at bar, Plaintiff is urging the Supreme Court to grant Plaintiff's Petition for issuance of a Writ of Certiorari so that the Supreme Court may draw a line to obviate a complete sacrifice of a substantive constitutional civil right, i.e., the right to a fair and impartial adjudicative process.

Issue #1: Part b. Whether the United States Court of Appeals for the Seventh Circuit erred in misrepresenting Plaintiff's allegation of fact (i.e., Defendant Bernthal intentionally falsified a judicial report and recommendation to serve his own personal agenda) by finding that Defendant Bernthal merely *treated* Defendants' Motion as if it were something other than what it was truly NOT?

District Court's Granting of Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) [Rule 12(b)(6)]

Rule 12(b)(6) Not Favored

A basic precept is that primary objective of law is to obtain determination of merits of any claim, and that case should be tried on proofs rather than pleadings; this is not to say or imply that motion to dismiss should never be granted, but sound judgment of trial judges should be exercised cautiously on such motion; Rule 12(b)(6) motion is not only effective procedural implement for expeditious handling of legal controversies, because pretrial conference, discovery procedures, and motions for more definite statement, judgment on pleadings, and summary judgment, all provide useful tools for sifting of allegations and determination of legal sufficiency of asserted claim, and salvaged minutes that may accrue from circumventing these procedures can turn to wasted hours if appellate court feels constrained to reverse dismissal of action, this being one of reasons why motion to dismiss is viewed with

disfavor in federal courts. *Rennie & Laughlin, Inc. v Chrysler Corp.* (1957, CA9 Cal) 242 F2d 208.

As general rule, motions to dismiss because of **failure to state** claim upon which relief can be granted are not favored, and should be granted sparingly and with caution only where it appears to certainty that no set of facts could be proven at trial which would entitle plaintiff to any relief. *Dann v Studebaker-Packard Corp.* (1961, CA6 Mich) 288 F2d 201, 4 FR Serv 2d 121

Motion to Dismiss
Admits Factual Allegations in Complaint

Generally, motion to dismiss on ground that petition does not state claim on which relief can be granted admits all facts well pleaded, and legal question presented thereby is governed by facts as pleaded. *Galbreath v Metropolitan Trust Co.* (1943, CA10 Colo) 134 F2d 569.

Motion to dismiss action for **failure to state** claim upon which relief can be granted admits facts alleged in complaint, but challenges plaintiff's rights to relief based upon those facts. *Ward v Hudnell* (1966, CA5 Tex) 366 F2d 247, 5 ALR Fed 955.

Genuine Issue of Material Fact

In general, if there exists any genuine issue of material fact between parties, the district court may neither dismiss the suit under Rule **12(b)(6)** nor grant summary judgment. *Smith v Nixon* (1979) 196 US App DC 276, 606 F2d 1183, cert den (1981) 453 US 912, 69 L Ed 2d 997, 101 S Ct 3147, reh den (1981) 453 US 928, 69 L Ed 2d 1024, 102 S Ct 892.

Rule 12(b)(6) does not countenance dismissals based on judge's disbelief of complaint's factual allegations. *Neitzke v Williams* (1989) 490 US 319, 104 L Ed 2d 338, 109 S Ct 1827 (superseded by statute on other grounds as stated in *Spivey v Godinez* (1997, ND Ill) 1997

US Dist LEXIS 15255) and (superseded by statute on other grounds as stated in *Brown v Citicorp* (1997, ND Ill) 1997 US Dist LEXIS 16496) and (superseded by statute on other grounds as stated in *Murray v Midwest Real Estate Inv. Co.* (1998, ND Ill) 1998 US Dist LEXIS 4655).

Factual issue should not be decided on motion to dismiss complaint. *Frederick Hart & Co. v Recordgraph Corp.* (1948, CA3 Del) 169 F2d 580, 78 USPQ 310.

Court's function in ruling on motion to dismiss for **failure to state** claim is not to weigh potential evidence that parties might present at trial, but to assess whether complaint alone is legally sufficient to state claim for which relief may be granted, and in making determination, court may not look to other pleadings or documents to resolve factual disputes. *Swoboda v Dubach* (1993, CA10 Kan) 992 F2d 286.

Complaint that presents claim turning on factual issues and inferences may not be terminated under Rule **12**(b)(6). Walker v National Recovery, Inc. (1999, CA7 Ill) 200 F3d 500.

Review by Court of Appeals
of a District Court's Dismissal pursuant to Rule 12(b)(6) -
Scope and Standard of Review

In reviewing disposition of motion to dismiss, court considers only those facts and allegations set forth in complaint and must view them in light most favorable to plaintiff; complaint should be dismissed only if plaintiff is not entitled to relief on any set of facts he could prove. Harper v Cserr (1976, CA1 Mass) 544 F2d 1121; Leone v Aetna Casualty & Surety Co. (1979, CA3 Pa) 599 F2d 566; Scoma v Chicago Bd. of Education (1974, ND Ill) 391 F Supp 452; First Delaware Valley Citizens Television, Inc. v CBS, Inc. (1975, ED Pa) 398 F Supp 925, 1975-2 CCH Trade Cases P 60676; Abraham v Beatrice Foods Co. (1976, ED Wis) 418 F Supp 1384; McNulty v Borden, Inc. (1979, ED Pa) 474 F Supp 1111, 115 BNA

LRRM 4563, 1979-2 CCH Trade Cases P 62847.

In considering sufficiency of complaint to withstand Rule **12**(b)(6) motion to dismiss, scope of review is limited and inquiry of court focuses on whether plaintiffs should be entitled to offer evidence in support of their claims. Mescall v Burrus (1979, CA7 Ill) 603 F2d 1266. In determining whether to grant motion to dismiss for **failure to state** claim, district court is limited to assessing legal sufficiency of allegations contained within four corners of complaint, and in reviewing district court's decision, appellate court is similarly limited, and extraneous arguments in appellate brief may not be relied upon to circumvent pleading defects. Jojola v Chavez (1995, CA10 NM) 55 F3d 488 (criticized in Schneider v Simonini (2000, NJ) 2000 NJ LEXIS 142).

Issue 1b – Summary/Conclusion

Based upon the case law as stated above, the United States Court of Appeals for the Seventh Circuit erred in misrepresenting Plaintiff's allegation of facts by finding that Defendant Bernthal merely *treated* Defendants' Motion as if it were something other than what it was truly NOT, since such misrepresentation clearly exceeded the Seventh Circuit's scope of review.

Issue #2: WHETHER the Seventh Circuit Court of Appeals erred in holding that Pulliam v. *Allen*, 466 U.S. 522, 541-42 (1984) (judicial immunity does not extend to injunctive relief) as applied to a *Bivens* action has been abrogated by Congressional amendment to § 1983 ("injunctive relief shall not be granted" in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity . . ."?

Accordingly, Petitioner contends:

- Proper development of the law requires that the Supreme Court answer the Questions Presented.
- The Questions Presented:

    - address problems beyond the academic or the episodic and
    - Involve Principles, the settlement of which is important to the public as distinguished from the parties.
- In this case, an opportunity is afforded to resolve a conflict between the Circuits within 2 important areas: (1) whether a judge's acts that allegedly violate federal criminal statutes can be viewed as judicial acts and (2) whether the holding that Pulliam v. *Allen,* 466 U.S. 522, 541-42 (1984) (judicial immunity does not extend to injunctive relief) as applied to a *Bivens* action has been abrogated by Congressional amendment to § 1983 ("injunctive relief shall not be granted" in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity . . ."

Accordingly, given:

- **that the Questions Presented are substantial and novel and had occasioned a split of authority among the lower federal courts,**
- **the need for uniform enforcement of the federal common law and the Federal Rules of Civil Procedure**

the petitioner respectfully prays that its petition for a Writ of Certiorari be granted.

Respectfully submitted,

Brad R. Johnson

Dr. Brad R. Johnson
Plaintiff Pro Se
935 S. Wildwood Ave
Kankakee, IL 60901
(815) 928-8455

Dated: January 26, 2004

APPENDIX [A]
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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

BRAD R. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**FILED**
	)	DEC 23 2002
MICHAEL P. McCUSKEY,	)	CLERK,
United States District Court	)	U.S. DISTRICT COURT
Judge, and	)	SOUTHERN DISTRICT
DAVID G. BERNTHAL,	)	OF ILLINOIS
United States Magistrate	)	EAST ST. LOUIS OFFICE
Judge,	)	
	)	
Defendants.	)	**No. 02-CV-943-DRH**
	)	

MEMORANDUM AND ORDER

Herndon, District Judge:

Before the Court is Defendants District Judge McCuskey and Magistrate Judge David G. Bernthal's motion to dismiss made pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff Brad Johnson filed suit in the United States District Court for the Central District of Illinois. On August 14, 2002, this suit was transferred to this district court. (Doc. Nos. 1-2). Plaintiff alleges that the two federal judges deprived him of his constitutional right to due process by transferring a case to another district.

The defendant judges are immune from suit. Judges have absolute immunity from damages liability for acts performed in his judicial capacity. *Scruggs v. Moellering*, 870 F.2d 376, 377 (7th Cir.), *cert. denied*, 493 U.S. 956 (1989), *abrogated on other grounds, Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993). *See also Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) *(per curiam); Stump v. Sparkman*, 435

U.S. 349, 356-57 (1978); *Moore v. Brewster*, 96 F. 3d 1240, 1243-44 (9th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997).

Judges also have immunity from equitable relief, such as injunctive and declaratory relief. *Bolin v. Story*, 225 F.3d 1234, 1240-42 (1 lth Cir. 2000); *Mehdipour v. Purcell*, 173 F. Supp.2d 1165, 1166-67 (W.D. Okla. 2001). This immunity applies even when the judge's acts are in error, malicious, or were in excess or his jurisdiction. *Stump*, 435 U.S. at 356. It is not overcome by allegations of bad faith or malice. *Mireles*, 502 U.S. at 11. It is not further overcome by allegations of conspiracy by the judge. Moore, 96 F.3d at 1244. A judge's act of deciding a motion in a case is certainly performed within his judicial capacity. Therefore, the action against District Judge Michael P. McCuskey and Magistrate Judge David G. Bernthal should be dismissed. This Court **GRANTS** the Defendants' motion and **DISMISSES** this action with prejudice.

IT IS SO ORDERED.

DATE: December 23, 2002

/s/
DAVID R. HERNDON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

BRAD R. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**FILED**
	)	DEC 23 2002
MICHAEL P. McCUSKEY,	)	CLERK,
United States District Court	)	U.S. DISTRICT COURT
Judge, and	)	SOUTHERN DISTRICT
DAVID G. BERNTHAL,	)	OF ILLINOIS
United States Magistrate	)	EAST ST. LOUIS OFFICE
Judge,	)	
	)	CIVIL ACTION NO.
Defendants.	)	02-943 DRH
	)	

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came to hearing before the Court on defendants' motion to dismiss.

IT IS ORDERED AND ADJUDGED that the motion to dismiss is **GRANTED** and this cause of action is **DISMISSED** with prejudice. Judgment is entered in favor of Defendants District Judge **MICHAEL P. McCUSKEY** and Magistrate Judge **DAVID G. BERNTHAL** and against Plaintiff **BRAD R. JOHNSON** ----------

NORBERT G. JAWORSKI, CLERK

December 23, 2002

BY: /s/
Patricia Brown, Deputy Clerk
EOD: 12-30-02

APPROVED: /s/
DAVID R. HERNDON, U.S. DISTRICT JUDGE

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

Submitted July 29, 2003*
Decided August 5, 2003

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 03-1249

BRAD R. JOHNSON, *Plaintiff-Appellant,* v. MICHAEL P. McCUSKEY and DAVID G. BERNTHAL, *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of Illinois No. 02-CV-943-DRH DAVID R. HERNDON, *Judge.*

ORDER

* After examining the briefs and record, we conclude that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. Civ. P. 34(a)(2).

In 2001 Brad Johnson filed a civil-rights lawsuit in the United States District Court for the Central District of Illinois against various public officials in California. The defendants moved for a change of venue pursuant to 28 U.S.C. § 1406(a). Magistrate Judge David Bernthal recommended granting the motion, but he analyzed it as if it had been filed pursuant to 28 U.S.C. § 1404(a) rather than § 1406(a). District Judge Michael McCuskey recognized that error and granted the motion pursuant to § 1406(a). Johnson then filed this *Bivens* action against Magistrate Judge Bernthal and Judge McCuskey, alleging that they violated his constitutional right to due process when Magistrate Judge Bernthal "intentionally falsified" his recommendation by citing § 1404(a) and when Judge McCuskey "covered up" the error, which Johnson described as a "criminal violation." *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Johnson sought monetary damages as well as injunctive and declaratory relief. The district court dismissed the case based on judicial immunity, and we affirm, though partially on different grounds

We will first address Johnson's claim for monetary damages. Judges are immune from lawsuits seeking monetary damages, *Mireles v. Waco*, 502 U.S. 9, 9 (1991); *Brokaw v. Mercer County*, 235 F.3d 1000, 1015 (7th Cir. 2000), and that immunity extends even to acts made in bad faith or with malice, *Mireles*, 502 U.S. at 11, *Brokaw*, 235 F.3d at 1015. There are two circumstances, however, when a plaintiff can overcome judicial immunity. First, "a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity." *Mireles*, 502 U.S. at 11. Second, "a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." Id at 12. The type of jurisdiction that the second circumstance refers to is subject-matter jurisdiction, *Homola v. McNamara*, 59 F.3d 647, 651 (1995), and Johnson

does not argue that the district court lacked subject-matter jurisdiction over his underlying case.

Instead, Johnson contends that criminal actions (and cover-ups of such actions) are nonjudicial acts for which judicial immunity does not apply. But the "criminal" conduct that Johnson complains about is Magistrate Judge Bernthal's decision to apply a particular statute concerning venue. That decision plainly was made in the judge's capacity as a judicial officer, and Johnson's characterization of it as "criminal" is patently frivolous. Moreover, even if Magistrate Judge Bernthal had acted in bad faith or with malice, absolute immunity would still bar this suit. *See Mireles,* 502 U.S- at 11-12.

Johnson's remaining arguments are similarly without merit. First, contrary to Johnson's contention, the rules regarding judicial immunity do not distinguish between lawsuits brought under *Bivens* and 42 U.S.C. § 1983. *Antoine v. Byers & Anderson, Inc.,* 508 U.S. 429, 433 n.5 (1993). Second, Johnson argues that magistrate judges are "inferior judges" who are not entitled to judicial immunity. But magistrate judges are federal judicial officers, 28 U.S.C. §§ 631-36, and judicial immunity applies as equally to them as it does to federal district court judges. *See, e.g., Stern v. Halligan,* 158 F_3d 729, 731 n.l (3d Cir. 1998); *King v. Myers,* 973 F.2d 354, 356 (4th Cir. 1992); *Tanner v. Heise,* 879 F.2d 572, 576-78 (9th Cir. 1989). Finally, Johnson argues that Judge McCuskey's "supervision" of Magistrate Judge Bernthal is an administrative act that is not covered by judicial immunity. While it is true that judges are not entitled to judicial immunity for administrative acts, *Forrester v. White,* 484 U.S. 219, 227-28 (1988), Judge McCuskey's review of Magistrate Judge Bernthal's recommendation is not such an act. The judge in *Forrester* demoted and discharged a probation officer, an act deemed administrative because it was a "personnel decision." *Id.* at 229. In contrast, Judge MeCuskey's review

of Magistrate Judge Bernthal's recommendation was a judicial act performed pursuant to 28 U.S.C. § 636(b)(1), which states that when a party objects within ten days to a magistrate judge's recommendations, a district court judge "shall make a de novo determination of those portions of the . . . recommendations to which objection is made." Thus, both judges were entitled to immunity from Johnson's claims for damages.

We now turn to Johnson's claim for injunctive and "declaratory" relief. The Supreme Court of the United States has held that judicial immunity does not extend to injunctive relief, Pulliam v. *Allen*, 466 U.S. 522, 541-42 (1984); Scruggs v. *Moellerlng*, 870 F.2d 376, 378 (7th Cir. 1989), *abrogated on other grounds, Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 n.3 (1993), but at least two circuits have carved an exception to that rule for cases where the defendant is a federal judge (sued in a *Bivens* action) rather than a state judge (sued under 42 U.S.C. § 1983), *Bolin v. Story*, 225 F.3d 1234, 1239-42 (11th Cir. 2000) (per curiam); Mullis *v. United States Bankr. Ct. for the Dist. of Nev.*, 828 F.2d 1385, 1391-94 (9th Cir. 1987). We found that exception to be "of doubtful merit," Scruggs, 870 F.2d at 378, but our doubt is now irrelevant because Congress has since amended § 1983 to provide that "injunctive relief shall not be granted" in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable." This amendment bars injunctive relief against both state and federal judges because "federal courts incorporate § 1983 law into *Bivens* actions." *Bolin*, 225 F.3d at 1242. Thus, the amendment to § 1983 limits the type of relief available to plaintiffs who sue judges to declaratory relief. *Id.*

But Johnson is not seeking declaratory relief in the true legal sense. *See* Fed. R. Civ. P. 57; 28 U_S.C. § 2201. In his complaint Johnson asks the district court to "declare"

that Magistrate Judge Bernthal and Judge McCuskey acted improperly in various ways when deciding the motion for a change of venue. Declaratory judgments, however, are meant to define the legal rights and obligations of the parties in the anticipation of some future conduct. *See Bontkowski v. Smith*, 305 F.3d 757, 761 (7th Cir. 2002); *see generally* 10B Charles Alan Wright, et al., Federal Practice and Procedure § 2751 (3d ed. 1998). For example, a party may seek a declaratory judgment to determine whether a particular contract term is binding and need not risk breaching the contract and await a suit. *See Bontkowski*, 305 F.3d at 761 (explaining how a declaratory judgment may be used as "a method of depriving the defendant of delay as a weapon"). Declaratory judgments are not meant simply to proclaim that one party is liable to another. *See Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1553-54 (Fed Cir. 1994) (en banc) (concluding that the plaintiff's prayer for a "declaration" of a regulatory taking was "different from a formal declaration under the Declaratory Judgment Act").

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGEMENT - WITHOUT ORAL ARGUMENT

Date: August 5, 2003

Before: Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ANN CLAIRE WILLIAMS, Circuit Judge

No. 03-1249

BRAD R. JOHNSON,
Plaintiff-Appellant
v.

MICHAEL P. McCUSKEY, Judge and
DAVID G. BERNTHAL,
Defendants-Appellees

Appeal from the United States District Court for the
Southern District of Illinois
No. 02-CV-943-DRH, DAVID R. HERNDON, Judge.

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1060-110393)